STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN JOHN CONLEY,

Defendant-Appellant.

UNPUBLISHED
April 2, 2002

No. 227654
Monroe Circuit Court
LC No. 99-030236-FC

Before: Jansen, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and thereafter sentenced to eighty-five to three hundred months of imprisonment. Defendant appeals as of right and we affirm.

Defendant first argues that there was insufficient evidence to sustain his conviction because there was no evidence that he "sexually penetrated" the complainant. This Court reviews a claim of insufficient evidence by viewing the evidence in a light most favorable to the prosecution and determining whether a rational trier of fact could have found that each element of the offense was proven beyond a reasonable doubt. *People v Smith*, 205 Mich App 69; 517 NW2d 255 (1994).

Defendant argues that the act of placing his mouth on the complainant's genital area was insufficient to establish "sexual penetration." However, this Court has previously held that sexual penetration may be established by an act of cunnilingus. *People v Harris*, 158 Mich App 463, 470; 404 NW2d 779 (1987). "Sexual penetration" is defined as "intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a; *Harris*, *supra* at 468. Cunnilingus requires "the placing of the mouth of a person upon the *external* genital organs of the female which lie between the labia itself, or the mons pubes." *People v Legg*, 197 Mich App 131, 133; 494 NW2d 797 (1992) (emphasis added). There is no requirement, if cunnilingus is performed, that there be something additional in the way of penetration for that sexual act to be performed. *Harris*, *supra* at 468. Here, the complainant described the portion of her body that defendant kissed and rubbed. Specifically, the complainant stated that defendant kissed her "on my private place . . . where I go pee, in between my legs." After a review of the record, and viewing the facts in a light most

favorable to the prosecution, we conclude that a rational trier of fact could have found beyond a reasonable doubt that defendant committed the charged offense.

Defendant next argues that the trial court erred when it instructed the jury without informing the jury that the prosecution had to prove the defendant "penetrated" the complainant. Defendant did not object to the trial court's proposed standard instruction or request a different instruction on first-degree criminal sexual conduct and, thus, this issue is forfeited. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). To avoid forfeiture under the plain error rule, the defendant must show that the error was plain, and affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

Here, the trial court instructed the jury that defendant engaged in a sexual act that involved the touching of the complainant's genital openings or genital organs with defendant's mouth or tongue, which is consistent with the standard jury instructions. See CJI2d 20.1(2)(c). Because there is no requirement that "penetration" be proven in first-degree sexual conduct cases where cunnilingus is involved, and the trial court gave the jury instruction for cunnilingus, which by definition only requires "contact," the trial court did not err by failing to inform the jury that defendant had to actually "penetrate" complainant to be found guilty of first-degree criminal sexual conduct. *Legg, supra* at 133. Given that the trial court did not give an improper instruction for first-degree criminal sexual conduct, there is no plain error.

Defendant also argues that the prosecutor engaged in misconduct at closing argument by testifying to facts of his own personal knowledge and used the prestige of the prosecutor's office to vouch for the credibility of his witness. Defendant did not object to the now challenged statements, therefore, this issue will be reviewed for plain error that affected defendant's substantial rights. *Carines, supra* at 764-765.

This Court reviews claims of prosecutorial misconduct by examining the remarks in context to determine whether the remarks denied defendant a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). A prosecutor may not ask the jury to convict a defendant on the basis of the prosecutor's personal knowledge or the prestige of his office, *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995), nor may a prosecutor vouch for the credibility of witnesses to the effect that he has some special knowledge concerning a witness' truthfulness. *Bahoda, supra* at 276. A prosecutor may, however, argue from the facts that the defendant or another witness is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Defendant first argues that the prosecution testified to facts from personal knowledge:

> How do you deal with getting sexually assaulted? How do you prepare? How can you possibly instruct a child of nine years old to deal with something like this?
>
> ***

> But of course we all know from our experience that the shame, that the humiliation that victims carry in a case like this can go on forever and ever.

Considered in context and evaluated in light of defense arguments and their relationship to the evidence presented at trial, no error occurred. The prosecution's statement is in the form of questions to which the prosecution does not suggest answers. Additionally, the prosecutor was merely responding to statements made by defense counsel concerning the possible reason complainant would delay coming forward to report defendant's sexual misconduct. The prosecutor's remarks were not inappropriate because the comments were no more than a response to defense counsel's arguments. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

Defendant also contends that the prosecutor vouched for the credibility of complainant:

> There has been no reason for [complainant] to say these things unless they are true.
>
> ***
>
> [T]here is no reason for it to go over here to [defendant] unless it is true.

Again, considered in context and evaluated in light of defense arguments and their relationship to the evidence presented at trial, no error occurred. The prosecution was rebutting defendant's argument that complainant was motivated to lie. *Duncan, supra* at 16. In light of the conflicting testimony, the prosecution argued that the facts and evidence demonstrated that complainant was credible. Accordingly, the prosecution did not improperly vouch for the credibility of the complainant. *Launsburry, supra* at 360.

Additionally, we note that the trial court instructed the jury that the arguments and comments of the lawyers were not evidence, thereby dispelling any prejudice. *Bahoda, supra* at 281. Consequently, we find no error requiring reversal with respect to the prosecutor's comments at closing argument.

Lastly, we note that defendant argues that trial counsel was ineffective because of counsel's failure to (1) move for a directed verdict, and (2) object to the trial court's proposed jury instruction. Although defendant has failed to properly present this issue because an appellant must identify the issues in the statement of questions presented, MCR 7.212(C)(5), we find no cause for reversal because there was sufficient evidence to sustain defendant's conviction and the trial court's instruction was proper. Consequently, defendant cannot show that trial counsel was either deficient or that any deficiency resulted in prejudice. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Richard Allen Griffin